Supreme Court, U.S.
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No. 93-1277

In The

Supreme Court of the United States

October Term, 1993

WILLIAM T. MOHAM,

Petitioner,

v.

STEEGO CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT IN COMPLIANCE WITH RULE 29.1

Respondent Steego Corporation is a wholly-owned subsidiary of BIL (Far East Holdings) Limited, a Hong Kong corporation. Respondent has no subsidiaries other than wholly-owned subsidiaries.

BIL (Far East Holdings) Limited, a Hong Kong corporation, is the controlling shareholder of Anadite Inc., Everest & Jennings International, Inc., Molokai Ranch, Ltd., Associated Host, Inc. and Mount Charlotte Limited.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals reversing a final judgment of the district court which held Respondent liable for denying Petitioner equal opportunity to seek employment with the purchaser of Respondent's assets.[1]

The decision below is not in conflict with any decision of any other court of appeals or inconsistent with

[1] The court of appeals' decision is attached to the Petition at Appendix A. References to the Petition appear as "(Pet.___)" and references to the Appendix appear as "(A.___)".

any decision of this Court. No special or important issues are raised by the petition, and further review is not warranted.

The statement of facts in the Petition contains a number of inaccuracies and omissions. First, in describing the meeting that took place in July of 1988 between John Lowrey, President of Mansfield Industries, and the supervisors and managers of Nabors Delaware, Petitioner states that "[t]here was no discussion of employment of anyone by the prospective buyers" (Pet. 11). While the issue of hiring a workforce may not have been specifically addressed at this meeting, Lowrey made it known that Mansfield wanted to start operations as soon as possible after the sale, and those in attendance understood that it would be their responsibility to have a work crew ready to start. Indeed, one of these employees testified that his actions were "just an effort to assist the new owners in starting up" (A.31).

Second, Petitioner states that "[t]he parties understood, including Steego negotiators that Mansfield Industries (a/k/a NABORS/LOUISIANA) was buying an ongoing concern and not buying for scrap" (Pet. 11). The testimony of Mr. Lowrey, relied upon by the court of appeals, flatly contradicts this statement: "[We] were buying assets, and it was up to us to make them productive. [Steego] didn't care whether we did or not" (A.31). He further testified that the ongoing service department had no effect on the price Mansfield was willing to pay: "[A]s far as Mansfield was concerned, . . . [Nabors] was closed down. It was nice that there were a few people hanging around, but it didn't help us any, didn't add anything" (A.31). Moreover, none of the employees who attended

the meeting with Mr. Lowrey was ever instructed, directed or authorized by any representative of Respondent or its subsidiary, Nabors Delaware, to begin recruiting a workforce on behalf of the new company. Neither Respondent nor Nabors Delaware assumed any obligation or made any effort to assist Mansfield in assembling a workforce.

Finally, Petitioner states, without any citation to the record, that Tommy Mason told repair shop employees as he was handing out applications that they should return them if they wanted "to work for NABORS/DELAWARE" (Pet. 12). This statement may be an inadvertent error but in any event is entirely inaccurate and unsupported by the record. There is no evidence suggesting that employees were told that the applications were to work for their current employer, Nabors Delaware. To the contrary, as plainly understood by the court of appeals, "Mason had made applications *for employment with the new company* (Mansfield) available to the repair shop employees" (A.26) (emphasis added).

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission and later instituted this action in federal court against Respondent and Mansfield Industries. On the eve of trial, Petitioner voluntarily dismissed Mansfield Industries (and its subsidiary, Nabors Louisiana) because they were in the process of being liquidated and had insufficient assets to pay any judgment that might ultimately be entered, thus leaving Respondent as the sole defendant. The district court found that Respondent had violated Title VII by denying

Petitioner an equal opportunity to seek employment with Mansfield solely on the basis of his race.[2]

On appeal, the court of appeals reversed, holding that Leone and Mason were acting solely for the benefit of Mansfield when they refused Petitioner employment and, therefore, their discriminatory acts could not be attributed to Respondent (A.32). Petitioner's petition for rehearing and suggestions for rehearing *en banc* were denied.

REASONS FOR DENYING THE WRIT

I. Petitioner's Statement Of "Questions Presented" Identifies No Issue Calling For Review By This Court.

The first "Question Presented" in the Petition identifies no issue of law, but merely asks for review of the court of appeals' application of a legal standard to the particular facts of this case. Moreover, contrary to the implication of the question stated, the court of appeals did not hold that Mason and Leone were not agents of Respondent. Rather, it held that the actions taken by those individuals were not within the scope of their

[2] The district court also found Respondent liable for its failure to grant Petitioner a pay raise in June of 1988, prior to the sale, and awarded him $320.00 on this claim. In its appeal, Respondent did not challenge this portion of the district court's judgment.

employment by Respondent, and therefore the individuals were not acting as agents of Steego while hiring repair shop employees for the new company (A.32).

The second "Question Presented" is not raised by the decision of the court of appeals. The court of appeals did not address the question whether an employer may be held liable for discriminatory acts affecting an employee's employment by a third party, or call into question the holding of *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) and similar cases. It merely held that those cases were inapplicable because the discriminatory acts were not attributable to Respondent (A.32).

II. The Decision Below, Finding On The Facts Presented That Tommy Mason And Joe Leone Were Not Acting As Agents Of Respondent When Hiring Employees For Mansfield, Is Not In Conflict With This Court's Decisions Or Decisions Of Other Courts of Appeals.

Petitioner has failed to identify any inconsistency between the court of appeals' decision and this Court's holding in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, this Court rejected the notion that employers are to be held strictly liable under Title VII for the acts of their supervisors, "regardless of the circumstances of a particular case." 477 U.S. at 73. Noting that Congress "surely" intended to place some limits on the acts of employees for which employers are to be held liable under Title VII, the Court directed the lower courts to look to general agency principles in determining employer liability, specifically referring them to the Restatement (Second) of Agency §§ 219-237 (1958). *Id.* at 72. In this case, the court of appeals applied the agency

principles set forth in the Restatement and concluded that Respondent could not be held liable for Leone's and Mason's failure to hire Petitioner to work for Mansfield Industries because Leone and Mason were not acting as Respondent's agents when making hiring decisions on behalf of Mansfield (A.29-32). The court of appeals' reasoning and conclusion is entirely consistent with this Court's holding in *Meritor*.[3]

Petitioner's suggestion (Pet. 17) that the decision below is in conflict with *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), is difficult to follow. Apparently, Petitioner regards "traditional notions of respondeat superior" as differing in some unexplained fashion from "the rules of agency". Of course, the principles of respondeat superior are simply a part of the rules of agency. There is no inconsistency between the majority and concurring opinions in *General Building Contractors*, and nothing in either that casts any doubt on the principles applied by the court of appeals in this case.

Petitioner also contends that the appellate court's decision is contrary to decisions reached in other Circuits, including the Fifth Circuit, regarding an employer's liability for the discriminatory acts of its supervisors (Pet.

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[3] In *Meritor*, this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability, but . . . agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. Thus, the only rule that comes out of *Meritor* relative to the issue of employer liability is that the courts should look to agency principles for guidance. The court of appeals' decision is not in conflict with this rule.

14-15). According to Petitioner, these courts "have established that in Title VII cases if an employer has control over the supervisor, the discriminatory acts of the supervisor are imputed to the principal/employer, thereby creating liability on the principal/employer" (Pet. 14). This incorrect statement of law is not only unsupported by the cases cited but also is directly contrary to this Court's holding in *Meritor Savings Bank FSB v. Vinson* that courts are not free to "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances . . . " 477 U.S. 57, 73 (1986).

None of the cases cited by Petitioner stands for the broad proposition of law he advances. Each of the cases involved either the discriminatory exercise of authority clearly delegated to the supervisor by the employer/defendant, or conduct by the supervisor which grew out of and was occasioned by the employment relationship. *See, e.g., Flanagan v. A.E. Henry Com. Health Services Ctr.*, 876 F.2d 1231, 1234-35 (5th Cir. 1989) (immediate supervisors suspended and later discharged plaintiff because of her race); *Jett v. Dallas Independent School Dist.*, 798 F.2d 748, 762 n.13 (5th Cir. 1986) (noting in dicta that employer can be held liable under Title VII based on *respondeat superior*); *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986) (supervisors participated in racial harassment of subordinate and made discriminatory car assignments and scheduling decisions); *Gay v. Board of Trustees*, 608 F.2d 127, 128 (5th Cir. 1979) (supervisor discharged plaintiff because of her race); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (supervisor's recommendation of discharge tainted by age bias); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 605 (7th Cir.

1985) (plant superintendent discharged plaintiff for failure to submit to sexual advances); *Tafoya v. Adams*, 612 F. Supp. 1097, 1104 (D. Colo. 1985), *aff'd*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987) (supervisor's discharge of plaintiff based on national origin); *Paroline v. Unisys Corp.*, 829 F.2d 100, 106 (4th Cir. 1989) (material issue of fact existed concerning adequacy of employer's remedial action upon learning of supervisor's sex harassment); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (supervisor participated in creating racially hostile work environment eventually leading to plaintiff's constructive discharge). In each of these cases, the supervisor was doing the very thing the employer authorized him to do – hiring, firing or supervising the employer's employees. The mere fact that the employer did not authorize the supervisor to perform these tasks in a discriminatory manner would not serve to insulate the employer from liability. The discrimination occurred in the course of the supervisor's exercising the authority he received from the employer, and, therefore, under common law agency principles, it was appropriate to hold the employer liable.

In the present case, in contrast, Respondent never granted Leone and Mason the authority to conduct interviews or make hiring decisions for Mansfield, a fact Petitioner ignores. As the court of appeals correctly noted, that authority came, either expressly or by reasonable inference, from Mansfield (A.30-31). Leone and Mason were acting solely for the benefit of Mansfield,

and pursuant to a grant of authority they received from Mansfield.[4]

Thus, unlike the supervisors' acts in the cases relied upon by Petitioner, Leone's and Mason's acts fell outside the scope of their employment with Respondent because they were in no way motivated by a desire to further Respondent's business (A.30-32); Restatement (Second) of Agency § 228(1). The court of appeals' decision does not, as Petitioner declares, "place an additional requirement on the plaintiff to prove that what the agent was doing for the employer when he committed racial discrimination was *in fact* benefitting the employer . . . " (Pet. 15)

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[4] Contrary to Petitioner's suggestion at pages 17-18 of the Petition, the fact that Mansfield may not have given *express* instructions to Leone and Mason to assemble a workforce and was not paying them at the time does not mean that no agency relationship could exist. Section 26 of the Restatement (Second) of Agency provides that:

> authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

Furthermore, Section 16 expressly recognizes that agency relationships may be gratuitous: "The relation of principal and agent can be created although neither party receives consideration." As the court of appeals noted, Leone and Mason clearly were under the impression, based on the meeting Leone attended with John Lowrey, a representative of Mansfield, that Mansfield wanted them to begin assembling a workforce and that they would be working for Mansfield after the sale (A.31). Had Petitioner not voluntarily dismissed Mansfield from the lawsuit, these facts would certainly have supported a finding that an agency relationship existed between Mansfield and Leone and Mason.

(emphasis added). Rather, the decision merely reaffirms the long-standing rule that employers will only be held liable for acts of their agents that are committed within the scope of the agent's employment, and that acts that are taken *solely* to benefit an independent third party are not within the scope of employment.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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